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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE BELMONTE,

Defendant and Appellant.

B291004

(Los Angeles County
Super. Ct. No. BA122684)

APPEAL from an order of the Superior Court of
Los Angeles County. William C. Ryan, Judge. Affirmed.

Jonathan B. Steiner, Executive Director, Suzan E. Hier,
Staff Attorney, California Appellate Project, under appointment
by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief
Assistant Attorney General, Lance E. Winters, Assistant
Attorney General, Noah P. Hill and Shezad H. Thakor, Deputy
Attorneys General, for Plaintiff and Respondent.

Jose Belmonte (defendant) appeals from the trial court's denial of his petition for recall and resentencing pursuant to Proposition 36, the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126).¹ The trial court determined defendant was ineligible for recall and resentencing because he was armed with a firearm during the commission of the subject offense. (§§ 1170.126 subd. (e)(2), 667, subd. (e)(2)(C)(iii).) We affirm.

BACKGROUND

“On the evening of October 25, 1995, [defendant] was standing with three other young men near the sidewalk of an apartment building. [A police officer], who was driving by in a patrol car, made eye contact with [defendant]. As [defendant] bent over and grabbed his waistband, [the police officer] saw the butt handle of a handgun at [defendant's] waist. [Defendant] then ran toward the apartment building. The police officer pursued [defendant] into the apartment building, and up the stairs leading to the roof. When they reached the top landing, where [defendant] was unable to continue because the roof door was locked, [the police officer] saw a semi-automatic pistol drop from in front of [defendant] to the floor and saw [defendant] kick the gun to the right. [The police officer] arrested [defendant] and recovered the weapon.” (*People v. Belmonte* (Apr. 29, 1998, B106814) [nonpub. opn.] (*Belmonte I.*))

On August 15, 1996, a jury convicted defendant of possession of a firearm by a felon. (Former § 12021, subd.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

(a)(1).)² ~The jury also found defendant had suffered three prior felony convictions within the meaning of the “Three Strikes” law. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) The trial court sentenced defendant to a prison term of 25 years to life. We affirmed the judgment of conviction in *Belmonte I*.

On February 15, 2013, defendant filed his petition for recall and resentencing. On June 25, 2018, the trial court denied the petition. This timely appeal followed.

DISCUSSION

Defendant contends the trial court erred because his conviction for being a felon in possession of a firearm did not support the trial court’s finding that he was “armed” with a firearm and thus disqualified from resentencing under Proposition 36.

I. Standard of Review

The interpretation of a voter initiative is a question of law that we review de novo. (*Kramer v. Intuit Inc.* (2004) 121 Cal.App.4th 574, 578.)

II. Proposition 36

In 1994, California enacted the Three Strikes law. (*People v. Valencia* (2017) 3 Cal.5th 347, 359.) Pursuant to that enactment, a defendant who committed a felony while having two prior serious or violent felony convictions had to be sentenced to “an indeterminate term of life imprisonment” (§§ 667, subd. (e)(2)(A), 1170.12, subd. (c)(2)(A).) It did not matter that the

² Former section 12021, subdivision (a)(1) was repealed effective January 1, 2012, but its provisions were reenacted without substantive change as section 29800, subdivision (a)(1). (See *People v. Sanders* (2012) 55 Cal.4th 731, 743, fn. 12.)

third felony was neither serious nor violent. (*People v. Johnson* (2015) 61 Cal.4th 674, 680.)

Effective November 7, 2012, Proposition 36 added section 1170.126 and amended sections 667 and 1170.12. (*People v. White* (2014) 223 Cal.App.4th 512, 517 (*White*).) Pursuant to this new legislation, an inmate who is serving an indeterminate life sentence as a third-strike offender can petition to be resentenced as a second-strike offender. (§ 1170.126, subd. (b).) The inmate will be denied resentencing if (1) the current offense was serious or violent, (2) the prosecution establishes one of the four disqualifying exceptions to resentencing under Proposition 36, or (3) if the trial court determines, in its discretion, that resentencing the defendant would pose an unreasonable risk of danger to public safety. (§ 1170.126, subds. (e) & (f).)

Relevant to this appeal, one of the disqualifying exceptions to resentencing under Proposition 36 is if “[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.” (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii)).)

III. No Error

Numerous cases establish that Proposition 36 disqualifies an inmate from being sentenced as a second-strike offender if his or her third felony conviction is for being a felon in possession of a firearm, and if the evidence shows the firearm was available for use either offensively or defensively. (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1035, disapproved on another ground in *People v. Frierson* (2017) 4 Cal.5th 225, 240, fn. 8; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 796; *White, supra*, 223 Cal.App.4th at p. 524; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1052;

People v. Elder (2014) 227 Cal.App.4th 1308, 1317; *People v. Hicks* (2014) 231 Cal.App.4th 275, 284.)

Defendant contends such cases were wrongly decided. We disagree. Those cases are well-reasoned, and they comport with our own interpretation of Proposition 36. The plain meaning of the phrase “*during* the commission of the current offense” refers to “a temporal nexus between the arming and the underlying felony[.]” (*People v. Osuna, supra*, 225 Cal.App.4th at p. 1032.) ““[I]t is the availability—the ready access—of the weapon that constitutes arming.” [Citations.]” (*White, supra*, 223 Cal.App.4th at p. 524.)

The record here shows defendant was observed with a handgun on his waist, and it was available for his use offensively or defensively. Thus, defendant was “armed with a firearm” within the meaning of section 1170.12, subdivision (c)(2)(C)(iii) and ineligible for resentencing. It follows the trial court properly denied defendant’s recall and resentencing petition under Proposition 36.

DISPOSITION

The order is affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT